In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 410

BOARD OF GOVERNORS OF THE FEDERA RESERVE SYSTEM, PETITIONER

v.

TRANSAMERICA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above-entitled case on July 16, 1953.

OPINION BELOW

The opinion of the Court of Appeals (R. 10075) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1953 (R. 10085). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a proceeding under Section 7 of the Clayton Act brought by the petitioner, the Board of Governors of the Federal Reserve System, the Board found that respondent, a holding company, had "proceeded steadily" for many years in a "persistent and continuing" policy of acquiring commercial banks in the states of California, Oregon, Nevada, Washington and Arizona; had brought under its control in this five-state area 41 percent of all banking offices, 39 percent of all bank deposits, 50 percent of all bank loans, and 46 percent of all deposit accounts—these being the appropriate yardsticks for measuring control of the business of commercial banking;— and had both the purpose and the power to continue to enlarge its occupancy of the field of commercial banking in the five-state area. The Board, on the basis of these and other subsidiary findings, made the ultimate finding that respondent's acquisitions tended to create a monopoly of commercial banking in the states of California, Oregon, Nevada, Washington and Arizona. The Board's resultant order required respondent to divest itself of its stockholdings of a number of banks. The court below set aside that order upon the ground that the foregoing finding lacked the support of necessary subsidiary findings; the court particularly stressed the absence of a finding that the five states "constitute a single area of effective competition among commercial banks."

The question presented is whether the Board's

findings that respondent's continuing acquisitions have, in their total impact and cumulative effect, vested in respondent (1) control over a substantial portion of commercial banking in five states, (2) a monopoly of such business in numerous communities in these states, and (3) power to exclude potential competition, adequately support the finding that the acquisitions have, as to the five-state area, a monopolistic tendency which brings them within the prohibitions of Section 7 of the Clayton Act, notwithstanding the absence of findings that each individual acquisition, considered separately, itself had such tendency.

STATUTE INVOLVED

Section 7 and 11 of the Act of October 15, 1914, 38 Stat. 730, as amended,[1] commonly known as the Clayton Act, provide in part as follows:

> Sec. 7 * * *
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> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise,

[1] This proceeding was brought under the Clayton Act prior to the amendment of that Act in 1950. The amendment (64 Stat. 1125) made no substantive change in the tendency to monopoly standard with which this petition is exclusively concerned. (See *infra*, p. 11, n. 19.) The principal changes were (1) the broadening of Section 7 to prohibit, in the case of corporations subject to the jurisdiction of the Federal Trade Commission (*i.e.*, not banks), acquisitions of assets as well as stock; and (2) to omit, under the substantial elimination of competition standard, the requirement that such competition had to be between the acquiring and the acquired corporations.

may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce [15 U.S.C. 18].

* * * * *

Sec. 11. Authority to enforce compliance with sections 2, 3, 7 and 8 of this Act by the persons respectively subject thereto is hereby vested * * * in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies * * * . [15 U.S.C. 21.]

STATEMENT

By an amended complaint (R. 93-111) issued under Section 11 of the Clayton Act on July 19, 1949,[2] the Board of Governors of the Federal Reserve System charged that Transamerica Corporation's acquisition of controlling stock interests in a substantial number of commercial banks in California, Oregon, Nevada, Washington and Arizona had had the effect of substantially lessening competition, restraining commerce, or tending to create a monopoly, in violation of Section 7 of the Act. After full administrative proceedings,[3] the

[2] The original complaint was issued on June 24, 1948 (R. 1-19).

[3] Extensive hearings were held before a member of the Board as hearing officer, the hearing officer filed a recommended decision, respondent filed exceptions, both parties filed briefs, and the Board heard oral argument (R. 362).

Board (two members dissenting (R. 402)) [4] on March 27, 1952, concluded that Transamerica's acquisition, holding and use of the stocks of 48 specified banks was in violation of Section 7 (R. 399), and entered an order (R. 400-1) directing Transamerica to divest itself of 47 of them.

The Board's Findings—The pertinent findings of the Board are as follows:

Transamerica is a holding company (Par. One (a), R. 363). The Transamerica banking group [5] had its origin in a bank organized in 1904 by A. P. Giannini in San Francisco, California (Par. Three (a), R. 367). Giannini and his associates acquired a number of other banks between 1904 and 1928 (*ibid.;* Par. Three (b), R. 367-368). Transamerica was organized by Giannini in 1928 for the purpose, *inter alia,* "of facilitating control and management through a single corporation of the banks and other corporations theretofore operated under his general direction," which were transferred to Transamerica (Pars. One (a), Three (c), R. 363, 368). The "Transamerica group * * * continued its aggressive policy of acquiring other banks and extending and expanding its opera-

[4] Two members did not participate.

[5] In addition to its banking interests—which also include 7.2 percent of the stock of The National City Bank of New York —Transamerica holds all the stock of a sizable real estate financing company and of three large insurance companies, and majority interests in a number of industrial companies (Par. One (c), R. 365-366). Two of these insurance companies have written insurance on automobiles whose purchase was financed by the Bank of America, Transamerica's principal banking subsidiary (Par. Five (i) (2), R. 381). See also Par. Five (i) (3)-(6).

tions" (Par. Four (a), R. 369) and, beginning in 1930, began to acquire banks outside California (Par. Four (b), R. 369-370).

The Transamerica group has "proceeded steadily" in a "persistent and continuing expansion" since its founding in 1904 (Par. Eight (b) (1), R. 388-389). Between 1904 and June 30, 1948, Transamerica acquired 679 banks and branches in the States of California, Oregon, Nevada, Washington and Arizona (Par. Eight (b)(3), R. 390).[6] By the latter date, Transamerica controlled 645 banking offices,[7] or 40.95 percent of all banking offices in the five-state area (Par. Eight (b)(1), R. 388). In California, Transamerica's offices increased from 352 in 1928 to 556 in 1948—the latter figure constituting 50.86 percent of all banking offices in the state—while non-Transamerica offices decreased from 968 to 537 (Par. Eight (b) (1) and (2), R. 388-389). For the five-state area, Transamerica's total offices increased from 565 in 1937 (the first year in which Transamerica expanded into the last of the five states) to 645 in 1948, while non-Transamerica banks decreased from 951 to 930 (*ibid.*). The latter changes occurred during a period in which the population of the five-state area

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[6] During the same period, Transamerica established 233 new branches (Par. Eight (b)3), R. 390). A number of these banks and branches subsequently were merged, consolidated, absorbed, or discontinued (*ibid.*).

[7] For these statistics, the Board used the term "bank" to denote the corporate entity (including its main banking office), and the term "banking office" to denote the physical premises on which banking operations were conducted. Thus, a bank with four branches ordinarily would have five banking offices.

increased by 70 to 80 percent, and income and business generally increased by much larger percentages (Par. Eight (b) (2), R. 389).[8]

Transamerica's share of total bank deposits in the five-state area increased from 31.27 percent in 1937 to 38.85 percent in 1948 (Par. Eight (c), R. 392),[9] and its share of total bank loans in the area increased, during the same period, from 32.24 percent to 49.97 percent (Par. Eight (d), R. 393). Transamerica accounted for $2,271,971,000 of the $3,826,313,000 increase in such bank loans, or approximately 60 percent (*ibid.*, R. 394).[10]

Bank of America—which, by its own statement, is "the world's largest bank" (Par. Six (d), R. 384)—was the "hard core" around which the Transamerica-controlled banking group was built, and still is the "center and principal support" for that group (Conclusion, R. 399). From 1928 to 1937, Transamerica held more than 99 percent of the stock of Bank of America (Par. Five (a), R. 371). Although distributions to stockholders and sales had, when the Board's order was issued, reduced Transamerica's holdings to 5.6 percent

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[8] As of December 31, 1947, there were 152 communities in the five-state area in which Transamerica had acquired from one to five banks and was operating the only banking office. In 96 communities Transamerica had acquired from one to five banks and was operating one of the two banking offices. In 8 communities Transamerica had acquired and was operating the two existing banks (Par. Eight (b) (3), R. 390).

[9] As of September 30, 1949, Transamerica had 46.2 percent of the total *number* of deposit accounts in the five-state area (Par. Eight (g), R. 395).

[10] In California, Transamerica had approximately 90 percent of the total increase in bank loans ($2,128,083,000 of $2,348,281,000) from 1928 to 1948 (Par. Eight (d), R. 394).

(*ibid.*),[11] Transamerica's "effective control" has "not [been] interrupted" (Par. Five (c)(1), R. 373), and Transamerica still controls and directs the bank's "major policies and activities" (Par. Five (j), R. 382).

Many factors, "tangible and * * * intangible," have "contributed to and aided in the continuance of this control to the present time, and promise its continuance in the future" (Par. Five (c)(1), R. 373). Important intangible factors include the history of "Giannini management" of Transamerica and its affiliates, the long established relationships among members of this group, the long and continuous service of most of its important officials, the "expectation and acceptance" of policy direction, and the momentum of established policies and procedures (Par. Five (e), R. 376).[12] In 1948, the directors of Bank of America were, with very few exceptions, either long term employees of, or had been closely connected with, the Transamerica group for many years, and could neither have been elected nor continued as directors without Transamerica's "approval and sup-

[11] In 1937 Transamerica distributed to its stockholders 58 percent of its Bank of America stock (Par. Five (a), R. 371). By 1948 its holdings had been reduced to 22.88 percent (*ibid.*). The Board found that even if Transamerica were required to divest itself of all of its Bank of America stock, the existing control relationships between the two companies would continue (Conclusion, R. 399). After the Board's decision, Transamerica sold the remainder of its Bank of America stock, and, as a result of the death of L. M. Giannini (son of A. P. Giannini), the two companies ceased to have any common directors (R. 10084).

[12] A number of other factors are discussed in the Board's findings (Par. Five (c)-(i), R. 373-382).

port." (Par. Five (f), R. 378).[13] Officers and personnel are "freely moved" from Bank of America to other banks controlled by Transamerica, and from such banks to Bank of America (Par. 5 (h)(4), R. 380-381).[14] Since Transamerica became a minority stockholder of Bank of America in 1937, Bank of America has performed a "wide variety of services" for Transamerica which are inconsistent with cessation of control (Par. Five (h)(2), R. 379).[15]

The commercial banks' monopoly of money-payment and money-creation functions and their market domination of short-term business credit,[16] together with the fact that substantially all who require the services of commercial banks must rely upon those banks to which they have ready access, [17]

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[13] Fourteen of Bank of America's 25 directors in 1948 had been members of the 1937 Board which Transamerica had elected when it held more than 99 percent of the bank's stock (Par. Five (f), R. 376); 12 of the directors had also been directors and/or officers of Transamerica or its non-bank subsidiaries in various years since 1937 (Par. Five (g), R. 378).

[14] When Transamerica offered to purchase the stock of a bank in 1941, it agreed that, if any officers or employees of that bank lost their jobs as a result of management policy, it would endeavor to find them jobs with Bank of America (Par. Five (i)(5), R. 382).

[15] Such services have included assisting Transamerica in acquiring other banks (Par. Five (h)(2), R. 379-380), and auditing and examining Transamerica's bank and non-bank subsidiaries (Par. Five (h)(3), R. 380).

[16] Commercial banks have "no substantial competition * * * from any source" in performing these functions (Par. Seven (b), R. 385).

[17] While very large concerns with national standing have access to credit from and maintain accounts in banks in many parts of the country, the "great multitude" of commercial bank customers—smaller concerns, local business enterprises, and ordinary citizens—must depend upon their local commercial

gives such banks "much power" over the business affairs of their local area. They can overextend credit by lending too freely and too much, restrict credit so as to "hamper growth and development," and discriminate among business enterprises and individuals. (Par. Ten (a), R. 398.)

Authorization from regulatory agencies is required before new banks or branches may be established. Such agencies consider the effect of the new bank upon existing banks and the availability of business to support the new bank, and seek to avoid overbanking. Although a bank may not lawfully buy the stock of another bank, a holding company such as Transamerica is not so restricted. The size and resources of a large banking group enable it to enter a community before a bank clearly is warranted and, by establishing a branch which does not have to be immediately profitable, pre-empt promising areas and "anticipate and block" the organization of a local bank. As the size and resources of a banking group increase, so does its power to suppress potential competition. Its "size alone" may "discourage and prevent" the establishment of competing independent banks, or induce existing small banks which do, or are likely to, compete with it, to sell out. (Par. Ten (b), R. 398.)

The Board noted that the "significant standards" under Section 7 were the number of com-

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bank, and cannot satisfy their banking needs through distantly located banks (Pars. Seven (f), R. 387; Ten (a), R. 398).

mercial banking offices, volume of deposit liabilities, volume of loans, and number of deposit accounts, of which Transamerica-controlled banks had, in the five-state area, approximately 41 percent, 39 percent, 50 percent, and 46 percent, respectively; and that despite the tremendous growth of population and wealth in the area, Transamerica's expansion had been accompanied by a decrease in the number of independent banking offices, a substantially higher relative increase in deposits in Transamerica-controlled banks than in others, and the absorption by such banks of "practically all" of the total increase in bank loans (Par. Ten (c), R. 399). The Board concluded that Transamerica had the "purpose and the power" to continue to acquire additional banks (*ibid.;* Par. Six (e), R. 384);[18] and that the effect of Transamerica's holding and use of its bank stocks may be to tend to create a monopoly in commercial banking in the five-state area (Par. 10 (c), R. 399).[19]

The Board's order (R. 400) directed Transamer-

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[18] The Board noted that Transamerica's general reputation among bankers in the area is "one of constantly seeking to acquire more banks" (Par. Six (b), R. 383).

The Board's findings also describe Transamerica's attempts, in 1942 and 1943, to acquire control of a large bank in Los Angeles (Par. Nine, R. 396-397). Although the attempt failed, Transamerica "continued its efforts" to buy stock in the bank (R. 397), and by April, 1949, held more than 20% of the stock (*ibid.;* R. 110). Since 1943 Transamerica has elected 5 of the 21 directors of this Bank (R. 397).

[19] The Board also found that the effect may be to substantially lessen competition and restrain commerce in commercial banking in the area (Par. 10 (c), R. 399). Petitioner does not seek review of the Court of Appeals' rejection of those findings.

ica to cease and desist from violating Section 7, and to divest itself of the stocks of 47 banks.[20]

The Decision of the Court of Appeals—The Court of Appeals for the Third Circuit set aside the Board's order.[21] The court stated that, since monopoly involves the power to eliminate competition, a lessening of competition is "clearly relevant" in determining the existence of a tendency to monopoly (R. 10082); that under Section 7 it was not necessary for the Board to find that Transamerica had achieved monopoly power "but merely that the stock acquisitions under attack have brought it measurably closer to that end" (*ibid.*); that the Board's findings disclosed a "tremendous concentration of banking capital, and thereby of economic power which may be unwise and against sound public policy"; and that "it may well be that in some of these [competitive] areas [in which its acquired banks operate] Transamerica through the acquisition of banks has brought about a substantial lessening of competition and in that and other ways has moved measurably toward monopoly power in those particular areas" (R.

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[20] The Board did not require divestiture of Bank of America, on the theory that such divestiture would be a useless act and would not terminate the existing control relationship (R. 399-400).

[21] Prior to discussing the merits of the case, the court held that Section 7 of the Act applies to banks. The court stated that the Act covers "all 'corporations engaged in commerce' without exception," and that there was nothing in the legislative history of the Section to show—as Transamerica argued—that Congress intended to exclude banks (R. 10077). See *infra*, p. 20, n. 30. It does not seem necessary in this petition to summarize the evidence showing that the banks are in interstate commerce. Cf. Board Findings, Par. Two, R. 366-367; *infra*, p. 17, n. 26.

10081-2). The court further stated, however, that in order to establish a tendency to monopoly under Section 7, evidence of mere size and participation in a substantial share of the line of business involved is "not enough," since the tendency to monopoly "must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (R. 10083-4); that the "areas of existing effective competition in which monopoly power might be exercised" must first be determined (R. 10082), and that the Board's finding of a tendency to monopoly in the five-state area:

> fails for want of a supporting finding that the five states constitute a single area of effective competition among commercial banks and flies in the face of its own finding that the local community is the true competitive banking area [*ibid.*].[22]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Board's supporting findings were insufficient to sustain its ultimate finding that Transamerica's acquisition, use and holding of the stocks of a number of banks tended to create a monopoly in violation of Section 7 of the Clayton Act.

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[22] The Court of Appeals did not pass upon Transamerica's contention that it had been denied a fair hearing, or its application for leave to introduce additional evidence to show that it had disposed of all its Bank of America stock and that the two corporations no longer had any common directors (R. 10084)—facts which the Board does not dispute.

2. In holding that the Board could not base its finding that Transamerica's bank stock acquisitions tended toward monopolization of commercial banking in a five-state area upon its findings as to the cumulative effect of such acquisitions on the banking business in that area.

3. In holding that the Board's order was defective because of the absence of a finding that the five states in which the bank stock acquisitions were made "constitute a single area of effective competition among commercial banks."

REASONS FOR GRANTING THE WRIT

Petitioner asks this Court to review one issue: whether the tendency to monopoly standard of Section 7 of the Clayton Act is satisfied by a showing of the cumulative effect of a large number of acquisitions on the economic situation in the entire area in which they are made, or whether, as the court below held, the validity of each individual acquisition must be determined separately in relation to the particular "competitive areas in which * * * [the] acquired * * * [companies] operate" (R. 10082).

This question is an exceedingly important one in the application of the Clayton Act to the banking system of the nation—not only because of this case, but also because of the existence of a score of other bank-holding companies.[23] And the impact of the Clayton Act on stock acquisitions is, of course, not limited to bank holding

[23] See *infra*, p. 21, n. 31.

companies, so that this question reaches to every similar program of acquisition whatever the type of business involved.

1. (a). The thrust of Section 7 of the Clayton Act is not limited to individual acquisitions which of themselves may tend to monopoly, but also reaches a series of acquisitions whose cumulative effect may have that tendency, even though no particular acquisition, considered alone, may do so. Thus, when Congress amended Section 7 in 1950, it recognized that "[a]cquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions." H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8.[24] These amendments did not declare a "new policy" (see *supra*, p. 3, n 1) or make any substantive changes with respect to the tendency to monopoly provision involved in this case; they were merely a "more explicit expression of the purpose of the prior law,"

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[24] The Senate Report pointed out that the amendments were designed to deal with the fact that "[i]mminent monopoly * * * is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them * * *. Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four concerns produce the entire supply." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5. The quoted language was taken by the Senate Committee from a Federal Trade Commission report on "The Merger Movement."

and their legislative history is a proper aid in construing that law. *Jordan* v. *Roche,* 228 U. S. 436, 446. The Clayton Act, which was designed to "arrest the creation of * * * monopolies in their incipiency" (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1), must be read, we submit, as empowering the Board to intervene in the "cumulative process [of acquisition] when the effect * * * may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize (H. Rep. No. 1191, *supra,* p. 8).

The Board's findings clearly demonstrate that Transamerica's bank acquisitions have long since reached that point. The findings detail a pattern of "persistent and continuing expansion" by the Transamerica group since its founding. From a single bank in 1904 Transamerica has, through the acquisition of 679 banks and branches, reached the point where it now controls approximately 40 per cent of the entire commercial banking business in the five state area where it operates. This expansion of Transamerica was paralleled by a corresponding decline in the share of the market held by non-Transamerica banks. A company which has thus captured 40 per cent of a market to which access is restricted because of government regulation, which has the "purpose and power" to continue to acquire additional banks, and whose economic strength enables it to suppress potential competition, has travelled far enough along the

road toward monopoly power to empower the Board to step in and take appropriate remedial action against it. The Board does not have to "await arrival at the goal [of actual monopoly] before condemning the direction of the movement." *International Salt Co.* v. *United States,* 332 U. S. 392, 396.

(b) The fact that the primary market area of an individual commercial bank is the local community is not inconsistent with the Board's finding that the cumulative effect of a series of bank acquisitions by a holding company is a tendency toward monopoly in the entire area in which it operates. Section 7 refers to acquisitions which may tend to create a monopoly "of any line of commerce." "Line of commerce" is a concept broad enough to cover banking in a five-state area. And, since Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 2, makes it illegal to monopolize any part of interstate commerce which is a substantial segment thereof, either from a geographical standpoint or from the standpoint of classes of products moving in such commerce,[25] it necessarily follows that a "tendency toward monopoly" of such commerce within a particular area must be deemed within the reach of Section 7.[26] For the Clayton Act was designed to deal with monopolies "in their incipiency."

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[25] *Indiana Farmer's Guide* v. *Prairie Farmer Co.,* 293 U. S. 268, 279; *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226.

[26] The Board's finding (Par. Two, R. 366-367) that the commercial banks whose stock acquisitions are at issue in this case are engaged in interstate commerce was, as the Court of Appeals noted (R. 10077), not contested by Transamerica.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 356; S. Rep. No. 698, 63d Cong., 2d Sess., p. 1.

Thus, the Court of Appeals' holding that the Board was required to find "that the five states constitute a single area of effective competition among commercial banks" (R. 10082) appears grounded upon its erroneous construction of Section 7. Under the Act, the Board is empowered to deal with illegal tendency to monopoly in any area in which it finds that tendency. Since the five state area is the one in which Transamerica conducts its business, the Board was required to determine whether, within this particular area, Transamerica's acts were such as to create a tendency to monopoly of banking operations. Whether or not the five states constitute an area within which individual commercial banks may compete with each other, the Board's findings were sufficient to show that Transamerica was tending toward a monopoly of *all* commercial banking in that area.

Moreover, as the Board found (*supra*, pp. 10-11). Transamerica's power to suppress potential competition at the local level stems from the substantial portion of the total banking resources which it has acquired in the five-state area.[27] The very existence of this power to "suppress potential competition" (R. 398) itself shows the requisite tendency to monopoly which Section 7 of the Clayton

[27] This power is operative not only within the individual community, but also as between neighboring communities where it would be practicable for the local residents to seek banking assistance.

Act condemns. *Aluminum Co. of America* v. *Federal Trade Commission,* 284 Fed. 401 (C.A. 3), certiorari denied, 261 U.S. 616.

(c) The fact of the matter is that Transamerica's acquisitions have tended to monopoly in the only comprehensive sense in which a monopoly can exist in the banking business. It dominates, through its ownership and control of banks throughout the area in which it operates, the banking in five states. Yet the restrictive interpretation placed upon Section 7 by the court below would deny the Board any effective weapon for dealing with this "banking colossus" (R. 10082). For, although the court below recognized that the Board's findings disclosed a "tremendous concentration of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against public policy" (R. 10081-2), it nevertheless construed the Act to require the Board to determine the relationship between particular acquisitions and the local "competitive areas in which [Transamerica's] acquired banks operate" (R. 10082). But the extent of Transamerica's economic power is not measured solely by the number of local monopolies it has achieved in particular communities; it is also measured by the substantial share of the banking business which it now controls in the five state area. Indeed, few, if any, of the individual acquisitions, examined alone, could be shown to have the prohibited tendency.[28] By thus lim-

[28] Thus, in many of the local areas where Transamerica acquired the only bank in town, there obviously had been no prior local competition, and the acquisition imposed no demonstrable competitive restraint.

iting the scope of the Board's inquiry, the decision below would, as a practical matter, virtually vitiate the Board's power to deal with Transamerica's "tremendous concentration of banking capital, and * * * of economic power."

In like manner, the cases upon which the court below relied, for its restriction of the Board's ability to terminate Transamerica's ownership of the majority of banks in the five-state area, dealt with acquisitions of one manufacturing company by another, and not with the cumulative effect of a large number of acquisitions by a holding company.[29] As the Board had found (Par. Seven (f), R. 387), a commercial bank draws its customers primarily from its own local area. Banking, accordingly, has little of the traditional type of commercial competition between industrial firms which competitively invade market areas far from their home offices.

In sum, the Court of Appeals' quite correct holding (R. 10077) that Section 7 of the Clayton Act applies to banks[30] would have little practical significance if the Board were to be denied the power to deal with the cumulative broad impact of bank acquisitions in a relatively wide geographical area

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[29] *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291; *Aluminum Co. of America* v. *Federal Trade Commission*, 284 Fed. 401 (C.A. 3), certiorari denied, 261 U. S. 616; *V. Vivaudo, Inc.* v. *Federal Trade Commission*, 54 F. 2d 273 (C.A. 2) (R. 10083). Further, the *International Shoe* case did not involve the tendency to monopoly provision of Section 7; it dealt with the provision prohibiting stock acquisitions whose effect may be to substantially lessen competition between the acquiring and the acquired companies.

[30] In so holding, the court stated that the language of Section

upon the general banking situation in that area. Under the decision below, a few bank holding companies similar to Transamerica, operating in various sections of the country, could completely control the banking of this nation, with the petitioner powerless to intervene.[31] A decision which—viewed from the standpoint of banks alone—can lead to such results, obviously presents a question of importance for this Court to review.

2. The case in its present posture is clearly ripe for review by this Court. The holding of the court below does not turn merely on the failure of the Board to make certain allegedly necessary findings. For these subsidiary findings (as to the "effective area of competition among banks") would be necessary only if the correct test of tendency to

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7, relating to stock acquisition, was so "clear and unambiguous" as to leave no room for construction. "Its sweep," the court noted, "includes all 'corporations engaged in commerce' without exception." (R. 10076-7.) The court stated that there was nothing in the Act's legislative history to show—as Transamerica argued—that "Congress did not intend by Section 7 to exercise its power under the Commerce clause of the Constitution to the fullest extent" (R. 10077).

[31] In 1950, the Board presented to a Senate Subcommittee data which showed that, as of December 31, 1948, there were twenty bank holding companies which the Board regulated as holding company affiliates under the Banking Act of 1933, 48 Stat. 186, 12 U.S.C. 61. Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate, 81st Cong., 2d Sess., on S. 2318, p. 53. These 20 holding companies had 12.88 per cent (1231 of 9555) of the total commercial banking offices in the 23 states in which they operated, and had 18.58 per cent of the total commercial bank deposits in those states. *Ibid.*, p. 56. Although Transamerica was the largest of these bank holding companies, there were a number of others of substantial size. A New Jersey company had 98 banking offices, two Minnesota companies had 91 and 80, respectively, and a Massachusetts company had 78. *Id.*, p. 54.

monopoly were the one applied by the court below. If, as is our position, the correct standard was that actually applied by the Board, the Board's findings were fully adequate to sustain its order. The sufficiency of the Board's findings can be determined only by first deciding the substantive issue of statutory interpretation which this petition presents.

This is not a situation where a reviewing court has remanded a case to an administrative agency for further proceedings, and the correctness of that decision may be adequately tested upon review of the second agency order. Cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198-199. Here, as in *United States* v. *General Motors Corp.*, 323 U. S. 373, 377, the correctness of the ruling below is "fundamental to the further conduct of the case." Although the Court of Appeals apparently left the way open for further proceedings by the Board, [32] in any such further proceedings the Board would be required to apply the Act as construed by the decision below. Under such a test, the Board might well be unable to make the necessary findings (cf. *supra,* p. 19, n. 28), and be compelled to dismiss the proceedings. Thus, a failure to obtain review of the decision below at this stage of the case may result in denial to the Board of any review at all.

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[32] The court did not expressly remand to the Board for further proceedings, but merely stated that the Board might "decide, in the light of this opinion, to proceed further against Transamerica * * *" (R. 10084).

CONCLUSION

The decision below involves an important question of federal law which has not been, but which should be, resolved by this Court. The case itself is of great significance. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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Acting Solicitor General.

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